

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

<b>IN RE BLUE CROSS BLUE SHIELD</b>	:
<b>ANTITRUST LITIGATION</b>	:
<b>MDL 2406</b>	:
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	:
	:
	:
	<b>This document relates to</b>
	<b>Subscriber Track cases</b>

**DEFENDANTS' RESPONSE TO PROVIDER PLAINTIFFS'  
PROPOSED LANGUAGE FOR INCLUSION IN THE SUBSCRIBER SETTLEMENT  
PRELIMINARY AND FINAL APPROVAL ORDERS**

Defendants submit a brief reply on two key points. *First*, Providers mischaracterize Defendants' position as clearly stated at the Preliminary Approval Hearing record. Providers cherrypick one statement from defense counsel, but omit the further clarifying and explanatory statements on the same issue just a few pages later in the transcript:

MR. ZOTT: Your Honor, it's -- let me -- it's David Zott. Let me jump in just for a second. And I don't want to create any issues that we don't need to have today. *But when I answered, just to be clear, your earlier question about whether this settlement would impact the provider claims as providers, I'm thinking about it really in terms of we're not purporting to release any of their claims, and they've got every ability to assert those claims and to bring them. And that's really the context in which I was addressing it.*

(11/16/2020 Hr'g Tr. 63–64.) Defense counsel went on to explain some of the ways in which the Subscriber Settlement and resulting Blue System changes might impact Providers' claims. (*Compare id.* at 64–65 (“And I do think that [the System changes] would have an impact on the injunctive relief, for example, that providers would seek going forward...I think that is an issue we can address down the line, but we wanted to be clear that we do think, in that respect, there would be an impact”) *with* ECF 2629 at 2.) The Court recognized that all parties are preserving their ability to argue regarding those issues: “I don’t think you’re waiving any of those arguments.” (*Id.* at 65; *see also id.* at 58–59 (the Court: “As relates to injunctive relief, obviously there is

always a possibility of some effect [on Providers' claims] because of changes in a way they would affect the Blues system and the way it functions post-settlement or markets. ... But everybody will understand what the new system is and have an opportunity to address that.”).)

**Second,** Providers are wrong to rely on *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986), and *Martin v. Wilks*, 490 U.S. 755 (1989) (Providers' Br. at 2.) Unlike those cases, the proposed Settlement does not “dispose of” Providers' claims or impose additional “obligations” on Providers. To the contrary, the proposed Settlement *expressly preserves* Providers' claims brought in their capacity as providers of health care products or services. (ECF 2610-2 at ¶ 1(uu).) Moreover, like the consent decree that was upheld in the *Cleveland Firefighters* case, the provision about which Providers now complain “does not bind [Providers] to do or not do anything.” 478 U.S. at 530. The Settlement provides for changes to Defendants' practices, and as a result, will materially change the System. To the extent Providers challenge the go-forward System, those challenges will necessarily be to the System as changed by the Subscriber Settlement and must account for those changes. The proposed System changes do not prejudice providers at all, and do not impose additional “obligations” on them. Elimination of the National Best Efforts rule (which providers challenged as anti-competitive) in the go-forward System eliminates the “combination” that “moved this from a rule of reason into a per se analysis.” (11/16/20 Hr'g Tr. 36–37.) Defendants' proposal preserves the arguments of all parties in the Provider action with respect to the legal impact of the go-forward Blue System. Nothing more (or less) is required at this stage.

Defendants' proposed edits are faithful to the entirety of the Preliminary Approval Hearing record and to the nature of the go-forward System changes. Accordingly, Defendants respectfully request that the Court adopt their proposed edits and reject Providers' proposed edits.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 24, 2020, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

*/s/ David J. Zott, P.C.* \_\_\_\_\_

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